

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

affidavit

76-6087

To be argued by
SAMUEL J. WILSON

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 76-6087

JESSE B. STEPHENS, on behalf of himself and all other
persons similarly situated,

Plaintiff-Appellant,

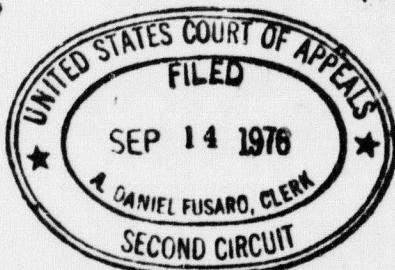
—against—

UNITED STATES OF AMERICA; E. THEODORE KLASSEN, in
his capacity as Postmaster General of the United
States; UNITED STATES CIVIL SERVICE COMMISSION;
ROBERT E. HAMPTON, in his capacity as Chairman
of the United States Civil Service Commission; and
ELMER B. STAATS, in his capacity as Comptroller
General of the United States,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF



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APPELLEES' BRIEF

Preliminary Statement

Plaintiff-Appellant, Jesse B. Stephens, commenced this action to recover certain pension rights, back pay, bonus and annual leave rights withheld from him by his former employer, the United States Postal Service. Defendant-Appellee Postal Service counterclaimed in its answer alleging that plaintiff had caused the Postal Service \$8,425.46 in losses by reason of his having removed items of jewelry from registered mail entrusted to him during his employment.

The District Court, Thomas P. Griesa, D.J., sitting without a jury, determined after a two day trial that plaintiff was entitled to \$7,533.00 on his claims against the Postal Service which amount was to be set-off against the sum of \$7,620.00 which the Court found plaintiff owed to the Postal Service on its counterclaim. The unreported opinion of the District Court appears at pages 216 through 222 of the trial transcript. A-46-52. The judgment appealed from was entered on March 16, 1976. A-53-54.

Issue Presented for Review

Was the District Court's finding that the defendant Postal Service had established by a preponderance of the evidence plaintiff's responsibility for the losses attributed to him in the counterclaim clearly erroneous?

Statement of Facts

Jesse B. Stephens was employed as a registry clerk at the 36th Street postal facility of the New York Post Office until March, 1969. He had been a Postal Service¹ employee since 1948. TR. 186-187.²

The Postal Service had become aware of a series of losses of registered mail items traceable to the 36th Street facility. TR. 10. As a result, when Postal Inspector

¹ For ease of understanding all references herein will be to the "Postal Service" and not its predecessor the Post Office Department. Pursuant to the Postal Reorganization Act (P.L. 91-375), the United States Postal Service took over the operations of the former Post Office Department on July 1, 1971.

² References "TR." refer to the transcript of the trial before the District Court.

Stewart Jones was first assigned the responsibility for investigating postal employee thefts in an area including the 36th Street facility in January, 1969, he took prompt action to locate the cause of these losses. TR. 6-10.

In order to advance the investigation Inspector Jones instructed two of his aides to station themselves in the observation gallery of the 36th Street facility on Saturday, March 15, 1969, to observe the conduct of the registry section employees from this concealed location. TR. 11. At the trial one of those aides, George Moffa, testified that during this observation he had seen Stephens during the course of his work open two sealed registered parcels, while concealing each inside a hanging mailbag, and later re-seal each parcel. TR. 133-38. Further investigation concerning these two parcels established that they contained items of jewelry which were found to be intact when delivered to their addressees. TR. 180.

Subsequently, Inspector Jones prepared a registered test parcel containing two diamond-like zircon stones and caused that parcel to be placed in the registry section of the 36th Street facility among the other registered mail on Saturday, March 22, 1969. TR. 14-16. Observation of that parcel from the lookout gallery disclosed that Stephens placed it in a hanging mailpouch and manipulated it with his hands inside the pouch much as he had been observed to do the previous Saturday. TR. 17. Shortly thereafter, Inspector Jones arrested Stephens who was found to have the contents of the test parcel, the zircon stones, concealed in the pocket of a pair of short pants he was wearing under his regular trousers. TR. 19. The test parcel itself was found in a mail pouch in Stephens' hand at the time of his arrest. TR. 18. The parcel had been cut into eight to ten pieces, apparently with a razor knife found in a drawer Stephens had been seen to open. TR. 17-19.

On October 14, 1969, Stephens was indicted by a Federal grand jury on a charge of embezzlement of mail in violation of 18 U.S.C. § 1709 based on his taking of the test parcel contents. A-3-4, ¶s 5 and 13.³

On January 8, 1971, Stephens was found guilty of this charge after a jury trial and the conviction was affirmed by this Court on May 22, 1971. A-3, ¶s 5 and 7.

Having completed the criminal investigation of Mr. Stephens, Inspector Jones then undertook the task of determining whether any specific Postal Service losses were attributable to Stephens' conduct. TR. 43. In making this determination Inspector Jones examined various Postal Service reports relating to losses to see which, if any, fit within the pattern of Stephens' observed conduct. TR. 43. He concluded that twelve losses totaling \$8,425.46 were chargeable to Stephens. A-5, ¶ 19.

During the trial of this action the Postal Service established on its counterclaim that Stephens was responsible for eleven of these losses, withdrawing its claim as to the twelfth. TR. 74. The Postal Service case was based primarily on the testimony of Inspector Jones and Postal Service documents admitted into evidence on consent of the parties. TR. 72-78, 79-131.

The appellant in his brief has conceded that the losses alleged did occur and that the amount of the Postal Service's losses were as claimed. Appellant's Brief, p. 5, n.5. Beyond this concession, the trial testimony and exhibit taken together clearly establish that:

1. Every loss charged against Stephens involved a registered parcel addressed to an ad-

³ References "A-....." are to pages of Joint Appendix, A-1-A-53, or Exhibits Appendix, A-55-A-110.

dressee served by the registry section of the 36th Street facility where Stephens worked or a registered parcel demonstrated by other evidence to have been at the 36th Street facility; and

2. Every loss charged against Stephens involved items of jewelry in registered mail, a type and content of package he had been observed to tamper with on two occasions and to steal from on a third; and

3. Every loss charged against Stephens involved registered mail which would in the ordinary course of the mails have been in the 36th Street facility registry section on a day when Stephens was working there or was shown by records to have actually been there; and

4. All registered mail losses attributable to the 36th Street facility ceased after Stephens arrest. TR. 130-131, 158-160.

For ease of understanding the evidence relating to each of the eleven losses is summarized below.

Parcel No. 1

Records of the Postal Service investigation of this loss in 1966 indicated that it was in the 36th Street facility on January 26, 1966 in the ordinary course of the mail, a day on which Stephens worked. TR. 85, A-55. This registered parcel was sent from J. Herbert Hall, Jewelers, Pasadena, California to Larre Co., New York City, and contained a diamond and sapphire bracelet. A-55-57.

Parcel No. 2

Postal Service records concerning this loss disclosed that this parcel was in the registry section of the 36th

Street facility on June 6, 1967 and was signed for by Stephens. Thereafter, on that day other clerks in the registry section found this parcel split open and without its contents. This registered parcel had been mailed by a Dr. Robert L. Davis, North Hollywood, California to the Elgin Watch Company, New York City and had contained a gold watch. TR. 58-67, 86-90; A-58-61.

Parcel No. 3

This registered parcel was mailed by Argo & Lehne, Columbus, Ohio to Louis Franklin Co., Inc., New York City, and contained seven pairs of diamond earrings and a pair of cufflinks. A-67-72. The cufflinks were found in a locked pouch of registered mail at the Grand Central Post Office which had been packed and locked by Stephens at the 36th Street facility. TR. 90-93; A-63-66. The remainder of the parcel was never found.

Parcel No. 4

This registered parcel was mailed by Tiffany & Co., New York City to Mr. Russell B. Stearns, Boston, Massachusetts, and contained a platinum and diamond clip. A-74-83. The parcel was refused by the addressee and returned to the New York Post Office. A-80. This parcel was found in the 36th Street registry section on June 25, 1968, a day Stephens was working, with the bottom three sides slit and the contents missing. A-80, TR. 93-98.

Parcel No. 5

This registered parcel was mailed by T. & W. Setting Co., Union, New Jersey, to Reinbro Corp., New York City, and contained ninety-two rings. It was found to

be in bad condition with a tear in the side of the carton at the 36th Street registry section on September 25, 1968. Stephens was on duty in the registry section that day. A-86, TR. 102-3. When delivered the package only contained 51 rings, 41 having been removed. A-86, TR. 99.

Parcel No. 6

This registered parcel was mailed by Elleard B. Heffern, St. Louis, Missouri to McTeigue & Co., New York City, and contained a diamond, emerald and platinum ring. A-92. Postal records indicate this package was received at the 36th Street registry section and was in that section on November 27, 1968. A-91-92. There is no further record of this package. A-92. Stephens was on duty on the date the package was last accounted for, November 27, 1968. TR. 103.*

Parcel No. 7

This registered parcel was mailed by Best Jewelry Co., Florence, Alabama to Jack Felsonfeld, Inc., New York City, and contained a string of matched pearls. A-96. The package never arrived at its destination and was addressed to a firm in the area served by the 36th Street registry section. TR. 106-107. Inspector Jones testified that this package, mailed in Alabama on December 5, 1968, would in the normal course of the mails have arrived at the 36th Street facility on December 6 or 7, 1968. TR. 109. Inspector Jones' check of Stephens' work records showed he had worked Saturday, December 7 and Monday, December 9. TR. 109.

* The transcript erroneously states that Stephens worked November 7, 1968. Context establishes the date as November 27, 1968.

Parcel No. 8

This registered parcel was mailed by R. M. Fitzsimmons, Louisville, Kentucky, to Cartier, New York City, and contained a watch. A-99. The package never arrived at its destination and was addressed to a firm within the area served by the 36th Street registry section. TR. 106, 110-111, A-99. Inspector Jones testified that this package, mailed in Kentucky on December 6, 1968, A-99, would in the normal course of the mails have arrived at the 36th Street facility on December 7, 8 or 9. TR. 110. Inspector Jones established that Stephens had worked on December 7 and 9, the 8th being a Sunday when the section was closed. TR. 111, 146.

Parcel No. 9

This registered parcel was mailed by a Mrs. May, Beverly Hills, California to David Webb, Inc., New York City, and contained five pieces of platinum and diamond jewelry. A-102. The package never arrived at its destination and was addressed to a firm within the area served by the 36th Street registry section. TR. 106, 112. Inspector Jones testified that this package, mailed in California on January 16, 1969 would in the normal course of the mails have arrived at the 36th Street facility on the 17th or 18th of January. TR. 113. Time records showed Stephens had worked on Saturday the 18th of January. TR. 113.

Parcel No. 10

This registered parcel was mailed by J. B. Hudson Co., Minneapolis, Minnesota to Maurice Tishman, New York City, and contained one platinum and diamond ring and one loose diamond. A-105. The package never arrived at its destination and was addressed to a firm

within the area served by the 36th Street registry section. TR. 106, 115, A-105. Inspector Jones testified that this package, mailed in Minnesota on February 13th, would in the normal course of the mails have arrived at the 36th Street facility on February 14 or 15. Time records showed that Stephens worked on Saturday, February 15th and Monday, February 17th. TR. 116. Furthermore, Inspector Jones had recovered mutilated parts of this package from two locations in the 36th Street facility. TR. 117-119.

Parcel No. 11

This registered package was mailed by Ramball Jewelry Store, Bethlehem, Pennsylvania to Cyril Modeshu, New York City, and contained one diamond engagement ring and one diamond wedding ring. A-108. The mutilated wrapper of this package was found in the registry section of the 36th Street facility on March 11, 1969. A-109. Time records showed that Mr. Stephens had worked on March 11, 1969. TR. 129.

A R G U M E N T

The finding by the District Court that the appellant was properly charged with responsibility for the loss of eleven registered items was not on the entire evidence clearly erroneous.

In finding in favor of the Postal Service's counterclaim the District Court was following this Court's guidelines set forth in *Boerner v. United States*, 117 F.2d 387 (2d Cir. 1939), *cert. den.*, 313 U.S. 587 (1941).⁴ In

⁴ The *Boerner* principles have been expressly followed by the Fourth Circuit in *Elmore v. United States*, 465 F.2d 1232 (4th Cir. 1972) and the Court of Claims in *Parker v. United States*, 187 Ct. Cl. 553 (1969).

that case a mail carrier was held responsible for losses of which he was neither charged nor convicted in a criminal forum. This Court held that the proper combination of "circumstantial or inferential evidence" *Boerner v. United States*, *supra*, 117 F.2d at 388, was sufficient to hold the carrier civilly liable for the losses. In establishing liability, the factors found to be important were the breakdown of normal postal processes, as evidenced by Boerner's conviction of embezzlement from the mails; Boerner's access to all the losses charged; the fact that no other employee or facility in the normal course of transmission of the mail whose loss was charged against Boerner was shown to have been engaging in mail depredation; and finally, that the losses ceased upon Boerner's arrest and removal from his position.

Each of the tests which must be met for civil liability under *Boerner* involves the weighing by the trier of fact of the circumstantial evidence presented and final determination of whether responsibility for the losses is proven by a preponderance of the evidence. Here the District Court heard four witnesses, including Stephens, reviewed the Postal Service's documentary support for the charging of the losses, and concluded that all the *Boerner* tests had been met. Stephens' appeal contends that these conclusions of fact constituted clear error, the standard required for reversal under Rule 52(a) of the Federal Rules of Civil Procedure. It is, of course, well established that Courts of Appeals will not undertake to reweigh the evidence to determine its preponderance. See e.g. *Vogel v. Forster*, 147 F.2d 614 (2d Cir. 1945), *cert. den.*, 325 U.S. 850. The Postal Service contends that, as to each element, "the inferences from the testimony are such as to persuade that the occurrence of an essential fact was *more likely* or probable than its non-occurrence." *United States v. Masiello*, 235 F.2d 279, 286 (2d Cir. 1956) (Frank J., concurring), *cert. den.*, 352 U.S. 882 (1956).

A. Stephens Was Arrested for a Mail Theft Similar to the Losses Charged Here.

Stephens' brief attempts to downplay the significance of his arrest for charging him with other losses. It is significant, however, because, as in *Boerner*, the District Court had "before it the ordinary postal processes plus extensive evidence that they had broken down as far as plaintiff's duties were concerned." *Boerner v. United States*, *supra*, 117 F.2d at 390. On the only two occasions when he was observed, Stephens was seen to be rifling registered parcels, containing, jewelry. The arrest was significant in that it established a type of registered item in which Stephens was apparently interested. It also indicated a method which Stephens utilized to remove the contents of registered parcels.

Despite the allegations in Stephens' brief (p. 31), it was not arbitrary to draw inferences as to other jewelry losses from Stephens' arrest. As with the test parcel, in all the losses charged against him it would have been clear, either from the designation of the addressee or the sender, or from Stephens' observed practice of opening registered parcels, that the parcel contained jewelry. Indeed, on March 15, 1969, when Stephens was observed tampering with two registered parcels, once he had opened them and determined that they contained watches that he did not want, he had the parcels resealed with their contents intact. TR. 134. Thus, he could be selective about the merchandise taken even if the contents of a register were not apparent from the outside.

Thus the actions which lead to the arrest were significant for much more under the *Boerner* test than a mere showing of opportunity, as Stephens' brief argues (p. 25).

**B. The Losses Occurred in the Registry Section
When Stephens was Employed There.**

The procedure followed by Inspector Jones in examining the registry losses at the 36th Street facility after Stephens' arrest was a careful and discriminating one. There is no dispute that the losses charged against Stephens did, in fact, occur or that the claims of postal patrons were paid. (Appellant's Brief, p. 5). Inspector Jones testified that he examined losses at the 36th Street facility in light of Stephens' work schedule; each loss was examined by use of the Form 1510, through which lost parcels are traced, Form 673, which is a report of the arrival of the parcel, and Form 565, which is a claim for indemnity for a lost parcel. TR. 43. In the case of those parcels for which an arrival time at the 36th Street facility was not recorded, Inspector Jones determined when the parcel would have arrived in the normal course of the transmission of registered mail to be delivered to addresses served by the facility or for transmission to another postal facility. A check of Stephens' time cards indicated that he was on duty when each parcel did arrive or should have arrived. TR. 82, 85.

The presumption which operated in *Boerner* regarding the normal transmission of the mail must be seen here as carrying the parcels as far as the registry section. Stephens' brief (p. 6-7) implies that there is some significance to the fact that most registered mail would have been repouched at another facility before its arrival at 36th Street. There was no showing that any other facility where such repouching occurred was experiencing mail depredation of any sort. Further, postal procedures provide that a registered parcel received in a damaged condition is to be noted on the manifold when it is repouched for dispatch. TR. 183. No such notation was made in the case of any of the losses charged against Stephens.

Stephens' brief (p. 26) also makes much of the fact that the registry section was not always open and that therefore deliveries of registered mail were accessible to virtually every employee at the facility. All registered mail except "outsides", those parcels too large to fit into pouches, is protected in transit by an elaborate locking system. The registered mail is placed in a pouch whose lock can only be opened by a special "rotary lock" key, which is kept in the registry section itself. TR. 34. This pouch is then placed inside another locked pouch. The opportunities for access to registered mail, even left outside the registry section, is thus quite limited. Further, there is no indication that any of the losses charged against Stephens were "outsides." Inspector Jones testified that to his recollection none of the parcels charged against Stephens had been "outsides". TR. 183. This would be logical as small parcels containing jewelry such as those charged against Stephens would easily have fit into the locked pouches for dispatching.

C. No Other Employees Were Shown to Have Been Involved.

Stephens was the only employee who was investigated at the 36th Street facility with regard to the losses with which he was charged. There arose no reason during the period in question to suspect any other employee. The attempt in Stephens' brief (p. 29) to indicate that clerk Olivetto was a likely candidate for such suspicion is misplaced, as his only connection with several of the losses was to bring apparent depredations to the attention of his supervisor. TR. 168. There was simply no reason to suspect any other employee at the 36th Street facility in connection with these losses and no reason arose to investigate any other employee.

D. Upon Stephens' Apprehension, the Losses Ceased.

The 36th Street facility had been experiencing registry losses from January, 1966 through March, 1969. These losses ceased after Stephens' apprehension and removal from the registry section on March 22, 1969. TR. 43. Inspector Jones testified that this cessation of losses lasted at least until September 1971, when he ceased to have security jurisdiction over the facility. TR. 159-160. This period of at least eighteen months without losses is in sharp contrast to the one case which appellee's research has disclosed in which claims charged under the *Boerner* rule have not been upheld, *Liberty Mutual Insurance Co. v. Staten*, 201 A.2d 528 (D.C.C.A. 1964). The court there was particularly influenced by the fact that although losses diminished, they did not cease on the employee's arrest. This was seen to be a key missing factor in the government's *prima facie* case. That factor is indisputably present here.

Stephens' brief points to other factors which might also explain the end to losses, such as the moving of the registry cage closer to the observation gallery and the turnover in personnel. The record reflects, however, that the registry cage was moved several months before Stephens' apprehension, and that three of the losses charged occurred within three months of Stephens' arrest. TR. 40. There is likewise no support for any contention that turnover in personnel, other than Stephens' own departure, was responsible for this cessation of losses.

A final factor which cannot be underestimated in this case is the District Court's opportunity to judge Stephens' own credibility. If the Court had chosen to believe Stephens' uncorroborated denial, this obviously would

have outweighed any judgment about the circumstantial evidence implicating Stephens. Despite the lack of an explicit holding to that effect, in light of its findings of fact, the Court must have disbelieved Stephens' denial. This determination is entitled to great weight on this appeal. F.R. Civ.P. 52(a); *Mazella Blasting v. Vitiello*, 250 F.2d 935 (2d Cir. 1957); *Martin v. Morse Boulger*, 256 F.2d 675 (2d Cir. 1958).

In sum, the District Court's finding that Appellee's counter-claim was proven by a preponderance of the evidence, based on a careful weighing of the evidence adduced and on a judgment on the appellant's credibility, should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: New York, New York
September 13, 1976.

Respectfully submitted,

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*United States Attorney for the
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AFFIDAVIT OF MAILING

CA 76-6087

State of New York)
County of New York) ss

Pauline P. Troia.

deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York. being duly sworn,

That on the
14th day of September, 1976 s he served ² copy^s of the
within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Michael D. Hampden, Esq., The Legal Aid Society,
1029 East 163rd St. Bronx, NY 10459
Attn: Ian Feldman, Esq.,

And deponent further says ■ he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

14th day of September, 19 76

Laurel Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977